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IN THE

Supreme Court of the United States

October Term 1951

No. 252

JOHN D. MCNABB, *Petitioner,*

v.

KATHERINE T. SLATER, ET AL.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit and Brief in Support Thereof

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STATEMENT OF MATTERS INVOLVED

This is an equitable action brought by petitioner to set aside a deed conveying an apartment house, the recovery of $4,000.00 and the cancellation and surrender of promissory obligations for $8,500.00, upon the ground that they were secured by respondent Thomas by fraud.

The circumstances themselves, as hereinafter related, bespeak fraud.

In the year 1946 petitioner, for a consideration of $50,000.00, of which he paid twenty odd thousand dollars in cash, bought an apartment house in Washington, D. C., and in the year 1948 he listed it with the Senate Realty Company for sale or trade at $50,000.00. Upon learning of the above facts, respondent Thomas, a real estate man and formerly a peach orchard owner and operator, came to Washington early in June 1948 from his home in Tennessee and visited the apartment house and interviewed the tenants thereof. Presumably he learned beforehand from the Senate Realty Company the true value of the apartment house, what petitioner had paid for it, its net yield and the cost of its maintenance and operation. At that time G. L. Cleckler, also of Tennessee and a friend of respondent Thomas, owned and operated a peach orchard in Tennessee which he desired to sell or trade. At the trial of this case Cleckler testified that he had owned the orchard and had operated it through his foreman Heneker Parker since 1946 and up to July 14, 1948 when he sold and conveyed it to the respondent Thomas, the actual monetary consideration therefor being $7,000.00. Thomas, by deposition, admitted in evidence at the trial, testified that prior to July 14, 1948 Cleckler offered the orchard to him for $6,000.00, and Heneker Parker, the foreman, testified that in 1946 Cleckler offered the orchard to him for $6,000.00.

In June 1948 Thomas returned to Washington and met petitioner for the first time. Presumably Thomas knew that if he disclosed the real facts he would not be able to effect an exchange with petitioner of the apartment house, in which petitioner had an equity of $25,000.00, for a peach orchard worth only $6,000.00. Presumably Thomas also knew that if he revealed to petitioner the name of the owner, Cleckler, petitioner would doubtless talk with Cleckler regarding the value of the orchard, its past yield, the cost of its operation, the actual number of bearing peach trees and the actual acreage of the

orchard, etc. So, to interest petitioner in the proposed exchange of the properties and to keep petitioner in ignorance of the true facts, Thomas represented to petitioner that he was both the owner and operator of the orchard and had been such for two years. Thus petitioner was led to believe that he was dealing with the actual owner and operator and not with a salesman of the owner. He then also represented to petitioner that the orchard was worth $55,000.00, yet at that time he knew that Cleckler was offering it for sale at $7,000.00. And to further exaggerate the orchard he represented that it contained 140 acres while Cleckler testified at the trial that it contaiend 120 acres, more or less; also that in 1947 the orchard produced 22,000 bushels of peaches and that it cost $2,200 to operate the orchard that year. While making these representations petitioner asked Thomas to exhibit his records covering the year 1947 disclosing the yield and cost of operation of the orchard and Thomas replied that he kept no such records. At the trial Cleckler, owner and operator, testified that he kept and had such records.

Petitioner, being impressed by the representation that the orchard was worth $55,000.00, arranged with Thomas to visit the orchard with him. Accordingly, petitioner drove to Tennessee where he was a stranger and unacquainted, and stopped at Thomas's home overnight at his invitation. The next day they together drove to the orchard and Cleckler was there but petitioner at that time did not know him nor his connection with the orchard. If Thomas had acted in good faith and had not concealed from petitioner the fact that Cleckler was the owner of the orchard, petitioner doubtless would have inquired of Cleckler regarding the value of the orchard, its acreage, its yield in bushels of peaches in 1947 and its financial yield, etc. Though Thomas was present at the time, he did not introduce Cleckler to petitioner, but withheld from him the fact that Cleckler was the owner and

operator of the orchard. Thomas then drove petitioner miles away to an adjoining county to talk with S. Harrison, a friend of Thomas's, and a fruit broker. The substance of the conversation between petitioner and Harrison, as testified to by Thomas in his deposition, was:

> "He came to my home in Graysville, then we came to Chattanooga and he went out to the peach orchard and went over the whole orchard. That was in—be in June nineteen forty-eight, somewhere around the middle of the month, and I taken him up to Evansville and introduced him to a Mr. Harrison, S. Harrison, who was our fruit broker; been handling fruit for a good many years, berries, in that territory, and was very familiar with orchards and how they were handled, and asked him to tell Mr. McNabb what he knew about this orchard, since he'd been handling the fruit off of it for several years, which he did. He told him what he knew about the orchard, or what he thought of the orchard. It had been reset with young trees between the old ones, and the trees were in bearing, and take out the old ones as he seen fit, and still have a new orchard. And he also told him that the orchard, with the proper care and handling, with a full crop of peaches, would produce anywhere from twenty to thirty thousand bushels of peaches in one season. And he also told him what the orchard had been doing, the price they'd been getting and the kind of fruit, and I told Mr. Harrison what I had told Mr. McNabb, and asked him to verify that as to whether I was right or wrong in regard to the orchard, and we went over it and he said, well, he thought that was just about right."

After interviewing Harrison, McNabb contacted E. L. Tipps, the county agriculture agent in Rhea County, which adjoins Hamilton County, and in due course Tipps wrote McNabb (Defendants' Ex. 1):

> "I drove fifty-four miles yesterday checking over the O. E. Thomas peach orchard near Soddy. This orchard has from nine to ten thousand peach trees in it, and I believe there will be approximately 2500 to 3000 bushels of peaches harvested this year from this

orchard. No doubt if the rains continue there might be a little more harvested than the number of bushels I stated above. A large portion of peaches in the lowland seem winterkilled and the only peaches left are on the highlands. From all indications, it seems that there will be a good demand for peaches in this area. Most all the peach crop was killed by late frost this spring. If this orchard had some improvements made on it within the next few years, it would soon repay the owner in production within a short time."

There is no testimony that petitioner ever inquired of Harrison or Tipps or anyone else regarding the ownership of the orchard, its value, its acreage, what it produced in 1947 or cost of operation. Instead petitioner testified that he relied entirely upon the representations of Thomas regarding those matters.

Petitioner accompanied by Thomas then returned to Washington, D. C., and on June 12, 1948 the exchange contract was made by them, Thomas contracting as the owner of the orchard. By the contract petitioner, as the consideration for the orchard, agreed to convey the apartment house to Thomas's daughter, respondent Slater, as directed by Thomas, to pay Thomas $4,000.00 in cash and $8,500.00 in equal annual instalments of $2,125.00 each, and Thomas agreed to convey the orchard to petitioner.

Petitioner, to evidence his good faith, put up a cash deposit of $1,000.00, whereas Thomas put up nothing.

Upon securing the contract from petitioner, Thomas returned to Tennessee and in order to substantiate his representation of ownership of the orchard, he connived with a title insurance company to issue to him a certificate of title, dated July 13, 1948, which certified that Thomas and his wife were the owners of the orchard in fee simple as joint tenants, though, as above stated, Cleckler testified that he was the owner and operator of the orchard until July 14, 1948 when he sold it to Thomas for a consideration of $7,000.00.

Upon Thomas procuring said certificate of title he notified petitioner of his readiness to close the transaction in accordance with his contract, whereupon petitioner again went to Tennessee to make settlement and again he stopped at Thomas's home. Before going to Thomas' lawyer's office to make settlement, Thomas and petitioner again went to the orchard. At the lawyer's office Thomas handed petitioner the above mentioned certificate of title showing that he, Thomas, and his wife were the owners of the orchard. Thereupon petitioner drew and handed to Thomas two checks payable to his order, one for $2,750.00 and the other for $250.00. He also handed Thomas two promissory notes of $2,125.00 each. Clecker was present but Thomas did not inform petitioner regarding his connection with the transaction.

At the trial Cleckler testified that on July 14, 1948 he, for a consideration of $7,000.00, represented by petitioner's check for $2,750.00 endorsed over to him by Thomas, and the delivery by Thomas of his two promissory notes aggregating $4,250.00, conveyed the orchard to Thomas. Cleckler also testified at the trial that Thomas did not pay these notes and a foreclosure sale instituted by Cleckler followed, at which he bought back the orchard for $2,000.00.

Upon closing the transaction at the lawyer's office petitioner took possession of the orchard and began picking the peaches when he learned for the first time of the falsity of the representations Thomas had made to him regarding the orchard. He immediately returned to Washington and brought the present action.

The District Court dismissed the action upon two grounds, the first ground being that petitioner had not "clearly" proved the fraud charged, and the second ground being that petitioner did not rely upon the representations of Thomas but upon his own independent investigation of the *value* and condition of the orchard.

Upon appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed the judgment.

The net result of Thomas's duplicity and fraud is:

That Thomas's daughter, respondent Slater, is the record owner of petitioner's apartment house.

That Thomas and Cleckler, together, have $3,000.00 of petitioner's money and, besides, Thomas holds petitioner's promissory notes for $4,250.00.

Cleckler has regained title and possession of the orchard.

That neither Thomas nor the appellee Slater put a single dollar in money or property in the deal.

Petitioner has been stripped by Thomas of practically all of his material possessions.

JURISDICTION

This Court has jurisdiction to issue the writ applied for under Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. The United States Court of Appeals for the District of Columbia had jurisdiction under Secs. 1291, 1292, of Revised Title 28, U. S. Code, and the United States District Court for the District of Columbia had jurisdiction under Sec. 306 of Article 11 of the 1940 D. C. Code.

QUESTIONS PRESENTED

1. Where the evidence, direct and substantial, establishes that as the result of misrepresentation and concealment, an innocent party to a transaction is defrauded of his property, is not fraud automatically inferred?

2. Assuming the accuracy of the "Statement of the Matters Involved," is not the Court "left with the definite and firm conviction that a mistake has been com-

mitted" in the findings of fact by the District Court and the law applicable thereto?

3. Where one party to a business transaction undertakes to make inquiry and investigation regarding the subject matter of the transaction, but through the misrepresentation and concealment of the other party he is unable to discover the truth, is not the party who is misled entitled to relief from the wrong, notwithstanding his futile investigation?

4. Where one party to a business transaction is requested by the other party to furnish information regarding the subject matter of the transaction, is not the party thus called upon for information under a legal and moral duty to furnish the information, and if he fails to furnish available information or falsely states that there is no such information, has he not committed a fraud upon the party misled by such concealment?

5. Where the testimony of a party is in conflict with his own and other contemporary written documents, is his testimony to be preferred over that of the written documents?

REASONS RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI

(1) It was established by clear and non-conflicting evidence that as the immediate result of misrepresentation and concealment by the respondent Thomas of material matters pertaining to the Tennessee orchard, such as the ownership and value thereof, he having represented that he was the owner of the orchard when in fact it was owned by Cleckler, and that it was worth $55,000.00 when in fact Cleckler had offered to sell it to Thomas for $6,000.00—, respondent Thomas himself secured from petitioner his equity of $25,000.00 in Wash-

ington real estate, $4,000.00 in cash, and promissory obligations aggregating $8,500.00—a total consideration of $37,500.00—in exchange for the $6,000.00 peach orchard. The law of the case is ruled by the following cited cases, in all of which the victim of the fraud prevailed in the appellate courts notwithstanding that independent investigation and inspection were made of the property there involved:

Stewart v. *Wyoming Cattle Ranche Co.*, 128 U. S. 383; *Tooker* v. *Alston*, 159 F. 599; *Sioux National Bank* v. *Norfolk State Bank*, 56 F. 139; *Brach* v. *Moen*, 35 F. (2d) 475; *Slater* v. *Ruggles*, 49 App. D. C. 277; *Owen* v. *Schwartz*, 85 U. S. App. D. C. 302, 177 F. (2d) 641 and *F. H. Smith Company* v. *Low*, 57 App. D. C. 167.

2. The decision of the United States Court of Appeals for the District of Columbia Circuit is in conflict with an applicable decision of this Court, namely, *Stewart* v. *Wyoming Cattle Ranche Co.*, supra.

3. The decision of the United States Court of Appeals for the District of Columbia Circuit is in conflict with three applicable decisions of courts of coordinate jurisdiction, namely *Tooker* v. *Alston*, supra; *Sioux National Bank* v. *Norfolk State Bank*, supra, and *Brach* v. *Moen*, supra.

4. The decision of the United States Court of Appeals for the District of Columbia Circuit is in conflict with three of its own applicable decisions, namely, *Slater* v. *Ruggles*, supra; *Owen* v. *Schwartz*, supra, and *F. H. Smith Company* v. *Low*, supra.

5. The decision of the United States Court of Appeals for the District of Columbia Circuit has not given proper effect to applicable decisions of this Court, namely, *Graffam* v. *Burgess*, 117 U. S. 180, 186, 194; and *United States* v. *U. S. Gypsum Co.*, 333 U. S. 364, 92 L. Ed. 766.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Court of Appeals for the District of Columbia, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 10,761, *John D. McNabb, Appellant,* v. *Katherine T. Slater, et al, Appellees,* and that your petitioner may have such other and further relief in the premises as to this Court may seem just.

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Attorneys for Petitioner

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Rule 52(a) of the Federal Rules of Civil Procedure provides that findings of fact in actions tried without a jury "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

However in the present case neither respondent Thomas nor his daughter, appellee Slater, testified at the trial, hence the District Judge had no opportunity to judge of their credibility.

In *United States* v. *U. S. Gypsum Co.*, 333 U. S. 395, 396, this Court said:

> "A finding 'is clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

The Court further said:

> "The Government relied very largely on documentary exhibits, and called as witnesses many of the authors of the documents. Both on direct and cross-examination counsel were permitted to phrase their questions in extremely leading form, so that the import of the witnesses' testimony was conflicting. On cross-examination most of the witnesses denied that they had acted in concert in securing patent licenses or that they had agreed to do the things which in fact were done. Where such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact. Despite the opportunity of the trial court to appraise the credibility of the witnesses, we cannot under the circumstances of this case rule otherwise than that Finding 118 is clearly erroneous."

And in *Mammoth Oil Co., et al.* v. *United States,* 275 U. S. 13, this Court said:

> "Fraud is a sinister thing, difficult of apprehension. It is seldom there is any direct evidence thereof, but it cannot be proved by mere suspicion. It is generally established by legitimate inferences arising from circumstantial evidence."

The substance of the circumstantial evidence in the case at bar is related in the "Statement of the Matters Involved."

Here there was no evidence, substantial or otherwise, to support the finding of fact "that the plaintiff failed to sustain the burden of proof in that he failed to establish that any fraud or misrepresentation had been practiced upon him by respondent Thomas." On the contrary, the case is full of earmarks of fraud practiced by Thomas and the result of his machinations positively establishes the fraud.

That Thomas misrepresented to the petitioner that he was the owner of the orchard is clearly established, not

only by the oral testimony, but also by two writings signed by Thomas, namely, the exchange agreement in which he contracted as owner to convey the orchard property to petitioner, and another writing signed by Thomas in which he agreed to pay the real estate broker a commission of $1,000 for exchanging "my 140 acres". The misrepresentation is further clearly established by the title report given by Thomas to McNabb, which recited that Thomas and his wife were the record owners in fee simple as tenants by the entireties of the orchard property. The undisputed fact is that Thomas and his wife never had the record title to the property; it always remaining in Cleckler.

Thomas knew that if he told the petitioner the truth, that Cleckler was the owner and operator of the orchard and had been such for two years past and that he could be found at the orchard, petitioner, upon visiting the orchard, naturally would question him regarding the value of the orchard, its acreage and the number of acres of bearing peach trees, the number of bushels of peaches it had produced in 1947, what was realized from them, and the cost of operation of the orchard during those years; so, to thwart such inquiry of Cleckler—the only man who actually possessed such knowledge—Thomas represented himself as being both the owner and operator of the orchard, and the men at the orchard as his employees.

The undisputed testimony further shows that, when the petitioner requested Thomas to exhibit his records of the production and cost of operating the orchard for 1947, he stated that he kept no records. Cleckler, called as a witness for the respondents, testified that he kept and had records showing the production and cost of operation of the orchard for that year. Had Thomas not concealed from the petitioner the fact that Cleckler was the owner and that he had kept records, the petitioner would have been able by inquiry of Cleckler to ascertain the informa-

tion desired to enable him to investigate the subject matter of the transaction.

When Thomas was requested by petitioner to disclose his records showing the production and cost of operation of the orchard for 1947, it was his legal and moral duty to state the truth and not to misrepresent or conceal from petitioner the existence of such records. *Copper Process Co.* v. *The Chicago Bonding and Insurance Co.*, 262 F. 66.

By *Sec. 547, Sub-Sec. (2) of the Restatement of the Law of Torts*, the rule is stated as follows:

> "The fact that the recipient of a fraudulent misrepresentation is relying upon his own investigation does not relieve the maker from liability if he by false statements or otherwise intentionally prevents the investigation from being effective."

Sec. 550 states the rule thus:

> One party to a business transaction who by concealment or other action intentionally prevents the other from acquiring material information is subject to the same liability to the other as though he had stated the nonexistence of the matter which the other was thus prevented from discovering."

Nor is there any evidence, circumstantial or otherwise, which rightfully supports the finding of fact that "the plaintiff relied entirely upon the information gathered by himself, by independent investigation, as to the condition and value of the Tennessee property." There is not a word of testimony that petitioner ever obtained from any one any independent information regarding these matters.

In *Stewart* v. *The Wyoming Cattle Ranche Co.*, 128 U. S. 383, 32 L. Ed. 439-442, the purchaser, before entering into a contract of purchase, caused an inspection of the ranch to be made by an expert employed by it, and upon his favorable report entered into the contract of purchase. It developed that certain misrepresentations were made by the owner of the ranch to the person em-

ployed to make the inspection. In an action to recover damages for the false representations the purchaser recovered and the judgment was affirmed by this Court, saying:

> "In this case certain misrepresentations with respect to the number of cattle and calves on a large ranch were made to a foreign purchaser residing in Scotland. Before closing the purchase, the vendee sent a representative to Wyoming to inspect and report to it concerning the herd and other animals and equipment on the ranch.
>
> "Clay, plaintiff's representative, testified that, in the course of his interviews with the defendant, the latter made to him the false representations alleged in the petition, and requested him to rely on these representations and not to make inquiries from the foreman and other persons; and that, relying on the representations, he made a favorable report to the plaintiff, which thereupon completed the purchase. The plaintiff also introduced evidence tending to prove the other allegations in the petition. The defendant testified that he never made the representations alleged."
>
> "In an action of deceit, it is true that silence as to a material fact is not necessarily, as matter of law, equivalent to a false representation. But mere silence is quite different from concealment: ALIUD EST TACERE, ALIUD CELARE; a suppression of the truth may amount to a suggestion of falsehood; and if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation because the concealment or suppression is in effect a representation that what is disclosed is the whole truth. The gist of the action is fradulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the deefndant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff."

> "The words and conduct relied on as amounting to false representations were those of the seller of a large herd of cattle ranging over an extensive territory, and related to the number of the herd itself, of which he had full knowledge, or means of information, not readily accessible to a purchaser coming from abroad; and the plaintiff introduced evidence tending to show that the defendant, while going over the ranch with the plaintiff's agent, made positive false representations as to the number of calves branded during the year, and also fraudulently prevented him from procuring other information as to the number of calves and consequently as to the number of cattle on the ranch."

In *Tooker et al.* v. *Alston,* 159 F. 599, (C. C. A.) 16 L. R. A. (NS) 818, 822, it appeared that the purchaser of a mine had been introduced by the vendor to the superintendent of an adjoining mine. This superintendent accompanied the purchaser on an inspection of the mine. The vendor remained on the surface. The superintendent said to the purchaser, "it just looks bully. It is just dandy—a bully good mine, or looks like it." When they returned to the surface the purchaser asked the superintendent his opinion and he replied, "it is a fine thing, if it is in solid ground." The vendor then replied, "there is no question about it. It is in solid ground." Whilst the vendee was in the town the vendor so attended him that he had little opportunity to secure disinterested advice .

In affirming a judgment in favor of the vendee, the court said:

> "The general rule is that a purchaser must exercise common prudence, and, if he fails to avail himself of the ordinary means of information, the law gives him no redress. Andrus v. St. Louis Smelting & Ref. Co., 130 U. S. 643, 32 L. Ed. 1054, 9 Sup. Ct. Rep. 645. But defendants cannot invoke this rule, because of their active efforts to conceal the condition of the

> mine, to thwart investigation and inquiry, and in misrepresenting the significance of conditions that were apparent. Such conduct brings the case within the salutary exception designed to avoid encouragement of fraudulent and deceitful practices. Strand v. Griffiths, 38 C. C. A. 444, 97 Fed. 854; Henderson v. Henshall, 4 C. C. A. 357, 7 U. S. App. 565, 54 Fed. 320. See also Stewart v. Wyoming Cattle Ranche Co., 128 U. S. 383, 32 L. Ed. 439, 9 Sup. Ct. Rep. 101. * * *
>
> "By the instruction in the next one, counsel sought the declaration of a rule that, if the plaintiff made an investigation himself, and consulted with others as to the condition of the mine or its value, there is a presumption of law that he acted upon information so gained, and not upon the representations of defendants. There is no such presumption of law. In Sioux Nat. Bank v. Norfolk State Bank, 5 C. C. A. 448, 12 U. S. App. 347, 56 F. 139, this court held that it was not a defense that plaintiff also made some other examinations and inquiries, if the conduct of defendants was a material, though not the sole, inducement to the transaction in question."

In *Slater* v. *Ruggles*, 49 App. D. C. 277, a case similar in character to the case at bar, in which a man and wife, as vendors, had been defrauded of their property by a shrewd and contriving real estate man, and where the man and wife had beforehand inspected the real estate which they took in exchange for theirs, the United States Court of Appeals for the District of Columbia said:

> "The various representations made by appellant, concerning the status and value of the properties in this District which he exchanged with appellees, were untrue, and were made for the obvious purpose of deceiving, and actually did deceive, appellees. Appellant's conduct, from the time he met appellees until he had absorbed practically everything they posessed, was characterized by such a lack of good faith that no other conclusion under the evidence could have been reached by the trial court. It was nothing short of a persistent and consistent scheme to deceive and

> defraud appellees, and the law would suffer reproach, were the suggestion to be entertained that the chancellor was without jurisdiction to right the wrong."

In its decision of the present case, the United States Court of Appeals for the District of Columbia said:

> "Thus, it is important to determine 'whether the parties stand on an equality'."

In the case at bar Thomas on the one hand and petitioner on the other did not stand upon an equality. Thomas was a shrewd real estate salesman and formerly a peach orchard owner and operator, whereas petitioner never owned nor operated a peach orchard but was engaged in administrative work for the American Red Cross and agencies of the United States.

In *Kell* v. *Trenchard,* 142 F. 16, the court, after discussing the principles announced in *Slaughter* v. *Gerson,* 13 Wall. 379, and other cases of like import, said:

> "The doctrine contended for in these cases as to the circumstances in which a party to the contract should have the right of rescission is clear; but is based upon the further principle that there must be no fraud, deception, or misrepresentation in the information given. In such case there can be no such thing as equality of information which is apparently open to each side. The law is well settled that a false representation by a vendor of a material fact constituting an inducement to the contract of purchase, and on which the purchaser had the right to rely, is a ground for the rescission of his contract by a court of equity, and that, too, though the party making the representation may have been ignorant as to whether it was true or false; the real inquiry being not whether the vendor knew the representation to be false, but whether the vendee believed it to be true, and was misled by it in entering into the contract."

And in *Dellefield* v. *Blackdel Realty Co.,* 128 F. (2d) 85, 90, the court said:

> "Defendants assert that statements as to value are only opinion, and not properly the foundation of an action for deceit. (Citations) While this may be generally true, it is recognized that under certain circumstances such representations may be actionable, as where they are put forth as a definite statement of fact by a party having superior or perhaps exclusive knowledge to one without such knowledge and misrepresent the actual views of the maker. (Citations)"

See also F. H. Smith Co. v. Low, 57 App. D. C. 167, 169, 18 F. (2d) 817, and Owen v. Schwartz, 85 U. S. App. D. C. 302.

Inadequacy of Consideration

The inadequacy of the consideration moving to McNabb in return for his $25,000.00 equity in the Washington property, his $4,000.00 in cash and his promissory obligations of $8,500.00—totaling $37,500.00 was so great as to shock the conscience of the court, as the value of the orchard was conclusively shown to be no more than $7,000.00—less than one-fifth of the amount paid by McNabb for it. In *Graffam* v. *Burgess,* 117 U. S. 180, 29 L. Ed. 839, 843, where a judicial sale was set aside for inadequacy of consideration, the court said:

> "From the cases here cited we may draw the general conclusion that if the inadequacy of price is so gross as to shock the conscience, or if in addition to gross inadequacy, the purchaser has been guilty of any unfairness, or has taken any undue advantage, or if the owner of the property, or party interested in it, has been for any other reason, misled or surprised, then the sale will be regarded as fraudulent and void, or the party injured will be permitted to redeem the property sold. Great inadequacy requires only slight circumstances of unfairness in the conduct of the party benefited by the sale to raise the presumption of fraud."

* * * *

> "It is true these observations, both of Mr. Kerr and *Chancellor* Desaussure, were made in reference to private sales between parties and do not strictly apply to judicial sales. But they show that great inadequacy of price is a circumstance which a court of equity will always regard with suspicion, unless it appears by the circumstances of the case, or by evidence, that it is no fault of the buyer." * * *

It is respectfully submitted that the petition for certiorari should be granted and the judgment of the court below be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 252

JOHN D. McNABB, *Petitioner,*

vs.

KATHERINE T. SLATER.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR KATHERINE T. SLATER IN OPPOSITION

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Opinions Below

The opinion of the District Court for the District of Columbia is unreported. The opinion of the United States Court of Appeals for the District of Columbia Circuit was rendered May 3, 1951, No 10761.

Questions Presented

1. Was the finding of the United States Court of Appeals for the District of Columbia Circuit that petitioner McNabb relied solely upon his own investigation erroneous?

2. Did the United States Court of Appeals for the District of Columbia Circuit commit error when it held that an expression of opinion as to the value of property is ordinarily held not to be actionable because it is not a statement of fact?

3. Did the United States Court of Appeals for the District of Columbia Circuit commit error when it held that there was only one representation about which there was no real conflict in the records and which did not depend upon evaluations of credibility: the representation as to value of the peach orchard?

Counter Statement of Matters Involved

This counter statement is deemed necessary because respondent believes petitioner's Statement of Matters Involved is inadequate and inaccurate.

In May 1948, O. E. Thomas, now deceased, father of respondent, came to Washington, D. C., from Tennessee and met Robert E. Cox, who was then a partner in Senate Realty Company. At this time Thomas had property which he was desirous of selling or trading and discussed this with Mr. Cox, who indicated that he might be able to work out something for Thomas. In June 1948 it was proposed that certain real estate located in the District of Columbia, managed by Senate Realty Company, be exchanged for the property in Tennessee which Mr. Thomas had previously indicated to Mr. Cox he wished to sell. Cox thereupon arranged a meeting in Washington between Thomas and Petitioner McNabb, who was then the owner of the Washington property. Thomas at no time represented to anyone that he actually owned the orchard in Tennessee but represented to Senate Realty Company that he merely had the orchard and would deliver title to it. Thomas represented to no one that he had operated this particular orchard but rather that he had owned one or two other orchards. He represented and believed that the orchard contained 139½ acres, and that the orchard con-

tained 11,000 or more peach trees. He first offered this orchard for sale for $55,000 but later reduced the price to $37,500. He estimated to appellant that the 1948 crop would produce 10,000 bushels but at the time of petitioner's first visit to the orchard he reduced his estimate to 5,000 due to intervening climatic conditions. At no time during the Washington negotiations or the negotiations between Thomas and petitioner did Thomas hold himself out to be G. L. Cleckler, who was the owner of the Tennessee orchard, but at all times represented himself to be O. E. Thomas who had an orchard to sell and to which he could deliver a good title.

During the meeting in Washington with petitioner, referred to hereinbefore, Thomas made representations to petitioner as outlined above and represented further that the foreman of the orchard was paid $3.00 per day when working.

Petitioner went to Tennessee in June 1948 to inspect the orchard. During this inspection, he saw 9/10 of the orchard from the top of a hill and at close range inspected ¼ of it. Petitioner himself testified that on this occasion he had ample time and opportunity to walk over any part of this orchard and examine it and he noticed at this time that many trees bore practically no peaches or very few. Thomas advised him that the entire orchard was similar to the portion seen except for one section the cold weather had hit the previous winter.

Thomas and petitioner then went to the town of Evansville and had a conversation with one S. Harrison, who indicated to petitioner that he had acted as broker for the original owner quite a number of years ago and, in petitioner's own words, "* * * that he had sold some of the products for Mr. Cleckler, who was the owner * * *." At that time petitioner requested Harrison "* * * to look at the orchard and give me an idea of it." At a later date petitioner requested Harrison to go to the orchard and inspect it and make a report to him, which Harrison did.

Then petitioner contacted E. L. Tipps, the county agriculture agent in Rhea County, adjoining Hamilton County, the situs of the orchard, and requested Tipps to inspect the orchard and submit a report, in writing, which he did. Thomas testified that petitioner McNabb advised him, prior to the consummation of the agreement, that he was waiting for information from Harrison and Tipps before he could decide what to do.

Thomas, in the exchange agreement of July 12, 1948, agreed to convey his right, title and interest in the orchard. He carried out this promise July 16, 1948. Subsequent to July 12, 1948, petitioner McNabb again went to Tennessee and visited the orchard July 15, 1948. On July 16, 1948, the date on which petitioner McNabb received title to the orchard, as previously indicated, he knew that G. L. Cleckler was the owner of the orchard.

According to petitioner's own testimony in the District Court, on the occasion of petitioner McNabb's *first* visit to the orchard in June, he inquired of Henekar Parker, witness in behalf of petitioner and former manager of the orchard, as to the nature of Parker's employment and compensation.

Petitioner started picking peaches the 17th of July, 1948 and continued picking peaches on the 18th, 19th and 20th of July, 1948. On the 20th of July, McNabb acknowledged his deed transferring the Washington property to Thomas' daughter, respondent Slater. Having executed the contract on July 20, McNabb continued picking peaches, with Parker acting in the capacity of foreman, until July 23, 1948. McNabb testified that his purpose in doing this was to see whether he had 5,000 bushels. He did not take steps to rescind the exchange agreement until after he finished picking peaches on July 23, 1948.

McNabb filed a complaint in the District Court of the United States for the District of Columbia August 9, 1948, naming as defendants O. E. Thomas, Lilah R. Thomas and Katherine T. Slater. O. E. Thomas and Lilah R. Thomas,

husband and wife, were not served with process as required by law and neither has entered an appearance in this case, although respondent Slater, who was properly served, entered the deposition testimony of O. E. Thomas, her father, in order to refute the allegations contained in the complaint, which if unchallenged would have deprived her of her property. The issues before the Court at that time were, whether the alleged representation of Thomas as outlined in paragraph 8 of the complaint were made as statements of fact which were untrue and known to be untrue by Thomas, or else recklessly made, were made with the intent to deceive and for the purpose of inducing the plaintiff to act upon them and whether plaintiff did in fact rely on them and was induced thereby to act to his injury or damage.

After hearing the evidence the Court entered a final judgment, based upon the entire record, dismissing McNabb's complaint with costs. Upon appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed the decision of the United States District Court.

Argument

Petitioner McNabb did not enter into the exchange agreement as the immediate result of the alleged misrepresentations by Thomas. According to the oral testimony of petitioner in open court, before consummating the exchange agreement he visited the orchard twice, contacted a fruit broker in the area who was familiar with the property and asked a county farm agent to report to him on the condition of the orchard. Upon consideration of this testimony the trial court held and the Court of Appeals affirmed the holding, that petitioner McNabb relied solely upon the information gathered by independent investigation as to the condition and value of the orchard. It is well settled that the trial judge is best able to estimate the credibility of the witnesses testifying with regard to the issues raised

and the Court of Appeals held that "Wo do not find his conclusions on these points 'clearly erroneous.' "

Petitioner contends that this decision of the United States Court of Appeals for the District of Columbia Circuit is in conflict with a decision of this Court, namely, *Stewart* v. *Wyoming Cattle Ranch Co.,* 128 U. S. 383, three decisions of courts of coordinate jurisdiction, namely, *Tooker et al* v. *Alston,* 159 F. 599; *Sioux National Bank* v. *Norfolk State Bank,* 56 F. 139; and *Brach* v. *Moen,* 35 F. (2d) 475, three of its own decisions, namely, *Slater* v. *Ruggles,* 49 App. D. C., 277; *Owen* v. *Schwartz,* 85 U. S. App. D. C. 302, 177 F. (2d) 641; and *F. H. Smith Company* v. *Low,* 57 App. D. C. 167, and has not given proper effect to decisions of this Court, namely, *Graffam* v. *Burgess,* 117 U. S. 180; and *United States* v. *U. S. Gypsum Co.,* 333 U. S. 364, 92 L. Ed. 766.

Respondent admits that in all of the above-cited cases, there exists definite conflict with the case at bar, however, the conflict is to be found in the facts rather than the legal principles concerned. It is well settled that fraud is present upon showing that the representations were made as statements of fact, which were untrue and known to be untrue by the party making them, or else recklessly made; that they were made with the intent to deceive and for the purpose of inducing the other party to act upon them; and that he did in fact rely on them and was induced thereby to act to his injury or damage. In the above-cited cases the courts held that the factual situations presented by the evidence warranted a finding of the existence of fraud. But in the case at bar, the elements constituting fraud were found not to be present both by the District Court and the Court of Appeals.

In *Stewart* v. *Wyoming Cattle Ranch Co., supra,* the fact to be ascertained was the number of calves. The ranch was so large that it would have been physically impossible for the investigator to have determined the number. He therefore was forced to rely on the information furnished

by the vendor. In the case at bar, McNabb could have easily obtained information as to the number of trees, number of acres, condition of the trees, etc., if he had attached any importance to these things as factors inducing him to enter into the echange agreement. In fact, Tipps, the county agriculture agent, who was hired by McNabb to report on the condition of the orchard, furnished McNabb, prior to the consummation of the exchange agreement, data concerning the number of trees, the number of bushels of peaches that would be harvested in 1948, the demand for peaches in the area, the fact that the peach crop was killed by a late frost in the Spring of 1948, and advice that the orchard would repay the owner in production within a short time, if some improvements were made on it. There was no evidence offered to show that Tipps was prevented in any way from making as full an investigation as he deemed necessary. Surely all of these things comprised components sufficient to have enabled McNabb to decide whether the orchard constituted a fair exchange for the Washington property. It is therefore apparent that in *Stewart* v. *Wyoming Cattle Ranch Co., supra,* the court held that there had been reliance because the knowledge necessary to obtain truth or falsity of the representations made was not readily accessible to the vendee. In the case at bar the trial court and the Court of Appeals held that there was no reliance because of the extent and nature of the independent investigation by McNabb.

In *Tooker et al* v. *Alston, supra,* the court found that there was active misrepresentation as to the physical condition of the mine in that the vendor represented that the mine was on solid ground when in fact the vendor knew that the floor of the mine for sale had broken through the roof of a worked-out mine below. Further, the court held that the vendor thwarted any investigation and inquiry by the vendee. In the case at bar the Court of Appeals held that not only did McNabb undertake an independent investigation of the property but also it did not appear

that Thomas had done anything to hinder the investigation in any way, and in addition held that the record contained ample evidence in support of the general finding of the trial court that there was no misrepresentation practiced upon McNabb.

Petitioner cites *Sioux National Bank* v. *Norfolk State Bank, supra,* to illustrate the rule of law that there does not exist a presumption of reliance upon information gained by investigation and consultation with others by a mere showing that an investigation was made. In the case at bar the Court of Appeals did not mention any such presumption but rather held that the record contained ample evidence in support of the trial court's finding that McNabb had in fact relied solely upon his own investigation as indicated by his subsequent course of action. Also, the Court of Appeals found that the representations made by Thomas were not material inducements to the transaction in question and affirmed the decision of the trial court that the independent investigation by McNabb was the sole material inducement.

In the case of *Brach* v. *Moen, supra,* the question for determination was whether there was knowledge on the part of appellants of the fraud practiced, not whether there was fraud. The Court said "That Moen was defrauded out of his farms by Stewart cannot well be questioned * * * he was as completely lost as a babe in the woods." In the case at bar the question of respondent's knowledge has never been raised. The question in the instant case is whether petitioner proved in the trial court the existence of fraud.

In *Slater* v. *Ruggles, supra,* cited by petitioner in an attempt to establish that the parties did not stand on an equality, petitioner fails to recite that McNabb was found by the Court of Appeals to be more than ordinarily capable of appraising the components of value in that he was an educated man who had had some experience with real estate to the extent of having been licensed as a real estate salesman in the District of Columbia.

In the case of *Owen* v. *Schwartz, supra,* the representations were made with regard to the existence of a $30,000.00 loan commitment, which is obviously a statement as to a material and existing fact, and acreage which an examination of the plat would not have disclosed. In the case at bar the representation as to value of the orchard was held by the Court of Appeals to be an expression of opinoin rather than a statement of fact. The loan commitment is in the class of things the value and existence of which are ascertainable. Value of property such as a peach orchard depends so much upon unpredictable factors that it falls within the area of speculative investments. As to the acreage of the peach orchard, the evidence unquestionably showed that McNabb was advised by the recitations contained in the deed that there were only 120 acres more or less.

In *F. H. Smith Company* v. *Low, supra,* the representation as to the value of land fell within one of the accepted exceptions to the general rule that representations as to value of such things as land are not actionable, in that they constitute mere expressions of opinion. In that case the representation was made to be treated as an immediate factor inducing action instead of a mere element to be investigated before action. There was present a threat to increase the price if not accepted at once, whereas in the instant case the evidence unquestionably indicated that the price of the peach orchard was steadily decreasing during the negotiations.

In *Graffam* v. *Burgess, supra,* which involved a judicial sale of a house evaluated at $10.000.00, plus furnishings, for a judgment of $28.95, the value of the house and the amount of the bill owed to Burgess were never in question, and the disparity was so great that it shocked the conscience of the court. In the instant case, petitioner offered as proof of the value of the District property his own testimony as to the amount he paid for it. Using this as a criterion it is noted that petitioner paid $37,500.00 for the peach orchard, thus establishing its value at that price.

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Petitioner contends that the decision of the United States Court of Appeals for the District of Columbia Circuit in the instant case has not given proper effect to the decision of this Court in *United States* v. *U. S. Gypsum Co., supra.* The Court of Appeals said "The issues of fact thus raised could be resolved only by estimates of credibility, estimates which could best be made by the trial judge, who was the trier of fact below. We do not find his conclusions on these points 'clearly erroneous.'" It is obvious that the Court of Appeals understood and followed the legal principles laid down by this Court in *United States* v. *U. S. Gypsum Co., supra.*

Conclusion

Respondent submits that the evidence adduced at the trial below did not show the existence of the elements of fraud. There was no clear and convincing proof. Much of the evidence was uncorroborated oral testimony, even in connection with facts of which records were allegedly kept. The record fails to disclose that the trial court's findings of fact were wrong. There is substantial evidence regarding the existence of facts which the lower court held were existent, and where the court failed to make a definite finding it was because there was not a sufficiency of evidence or because, after observing the demeanor of the witness in open court, the trial judge doubted the veracity of the witness.

The decision of the court below is plainly correct and there are no conflicts of decision or improper application of decision. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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